

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

BRANDON M. ROBERTS,

Appellant.

DOCKET NUMBER WD76255

Date: November 18, 2014

Appeal from:
Buchanan County Circuit Court
The Honorable Patrick K. Robb, Judge

Appellate Judges:
Division One: Thomas H. Newton, Presiding Judge, Lisa White Hardwick and
Anthony Rex Gabbert, Judges

Attorneys:
Shaun Mackelprang, Jefferson City, MO, for appellant.
Ellen H. Flottman, Columbia, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

BRANDON M. ROBERTS,

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WD76255

Buchanan County

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Anthony Rex Gabbert, Judges

Brandon Roberts appeals from his convictions for second-degree domestic assault and victim tampering. He contends the circuit court erred in refusing his proposed instruction for the lesser included offense of third-degree domestic assault. He also asserts that the court erred in permitting the State to join his charges and abused its discretion in overruling his motion to sever.

CONVICTIONS VACATED AND CAUSE REMANDED.

Division One holds:

(1) The circuit court erred in refusing to instruct on the lesser included offense of third-degree domestic assault. The only differential element between second-degree and third-degree domestic assault is that second-degree requires the mental element of knowingly, while third-degree requires the mental element of

recklessly. Under Section 562.021.4, RSMo 2000, evidence establishing that the defendant acted knowingly is sufficient to establish that he acted recklessly.

Because the jury could have believed that part of the State's evidence establishing that Roberts acted recklessly and disbelieved that part of the State's evidence establishing that he acted knowingly, a basis in the evidence existed to convict him of third-degree domestic assault. Therefore, Roberts was entitled to the lesser included offense instruction.

(2) The circuit court did not err in joining the charges and denying the motion to sever. Joinder was proper because Roberts's victim tampering charge was dependent upon and related to the domestic assault charge. Severance was not required because evidence of the two offenses was simple, and evidence of the other offense would have been admissible in the trial for each offense.

Opinion by: Lisa White Hardwick, Judge

November 18, 2014

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